IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

CIVIL REVISION APPLICATION NO.49 OF 2005

IN

SUIT NO.2830 OF 2002

Girnar Apartments Co-operative
Housing Society Ltd. : Petitioners.

versus

1. Mrs.Sonia Sood : Org.Plaintiff

2. The Bombay Municipal : Respondents.
Corporation & ors. Org.Defendants
Nos. 1 to 14.

Mr.Rajiv Kumar i/by Sanjay Udeshi & Co. for the petitioners.

Mt.Nitin Thakker with Mr.D.H.Mehta with mr.Siddhiki, Mr.Khan, Mr.Chirag Balsara and Mr.Aftab Diamondwala i/by Divya Shah and Associates for Respondent Nos. 8 to 15.

Mr.A.J.Bhor for Respondent Nos. 2, 3 and 4.

CORAM : D.G.DESHPANDE,J.

DATED : 3rd May 2005.

ORAL ORDER

1. Heard advocates for the petitioners and respondents. Respondent No.1/original plaintiff had filed a civil suit before the City Civil Court vide Long Cause Suit No.2830 of 2002. There were 14 defendants in all in that suit. Thereafter, while the suit was pending, the present petitioners filed an application for intervention. That application was allowed. The plaintiff was directed to amend the plaint. She did not amend the plaint. Certain interim orders came to be passed in favour of the plaintiff and, then plaintiff applied for withdrawal of the suit. A purshis to that effect or an application to that effect was filed on 05/01/2005 before the Vacation Judge. It was taken on record. The matter was adjourned to 08/02/2005 i.e. the date given by the judge before vacation. On 8.2.2005 the presiding officer was on leave, therefore, the matter was adjourned to 7.3.2005. On that date, as per the Roznama, the plaintiff and advocate were absent . Mr.Mali, advocate, was present for defendant Nos. 1, 2 and 3. Mr.Chhabria, advocate, was present for defendant No.4. Mr.Choudhari, advocate, was present for

defendant Nos.7 to 14. Mr.GV Aiman, advocate, was present for newly added defendants i.e. the present petitioners/society. In their presence the Court passed the following order :-

> "Perused the precipe filed by the plff. for withdrawing the suit Ex-2 dt. 5.1.05 filed during the vacation.
>
> In view of the fact that plff withdrew the suit, the same is hereby disposed of and dismissed with no order as to the costs."

It is this order that is challenged by the present petitioners. Their contentions were of two folds. Firstly, according to the petitioners under Order XXIII Rule 1A of the Code of Civil Procedure, the petitioners can apply to the Court for being transposed as a plaintiff and the same can be permitted by the Court. Secondly, according to them, the suit should not have been allowed to be withdrawn without amendment of the plaint as ordered by the Court. Thirdly, no notice of withdrawal was given to them. And lastly and alternatively if at all the petitioners are required to file a suit, ad

interim orders obtained by Respondent No.1 should be continued for some time in order to enable the petitioners to file a suit.

2. As against this, the counsel for the contesting respondents urged that though there was an order for amendment of the plaint to include the petitioners as defendants and though the plaintiff had not carried out the amendment, it was the petitioners who had granted the plaintiff extension for carrying out the amendment and, then plaintiff had not carried out the amendment, the liberty granted to amend the plaint got lapsed and, the petitioners did not move the trial Court of its own accord for amending the plaint by themselves so as to include them as the defendants or co-defendants. Secondly, it was contended by him that the application for withdrawal of the suit came to be filed on 5.1.2005. It was on record for more than two months. Before the impugned order came to be passed, the defendants did not raise any objection in that regard and no objection was raised even on 7.3.2005 when the Court allowed withdrawal of the suit, because at that time the petitioners were represented by their advocate,

but they did not record their objection to the withdrawal and, after 21 days of withdrawal of the suit, the petitioners advocate filed a peculiar type of purshis i.e. on 28.3.2005 before the Court it is as under :-

> "Be please to circulate the plaint and proceedings in the above suit ..... as the Applicant/newly added Defendant desires to make an application..... to record the application made by me on 7th March 2005 on behalf of Applicant/newly added Defendant for being transposed as the plaintiff in the above suit, which has not been recorded in the order dated 7th March 2005 passed by Hon'ble court, which we came to know when we received the copy of the said order dated 7th March 2005."

The counsel for the contesting respondent, therefore, contended that in view of this peculiar purshis, the revision application was required to be dismissed forthwith.

3. Thirdly, he contended that the suit filed

by the plaintiff was in her individual capacity. It was not representative suit. Therefore, she was at liberty to withdraw it at any time of her choice and withdrawal of the suit was allowed by the Court, then there was no question of now allowing the petitioners to be transposed as plaintiff. He also contended that if the society want to file a suit and claim similar reliefs, it was open for them to file such a suit by now. But they have deliberately chosen not to file suit and because they want to take advantage of certain orders passed in the suit which the court should not permit.

4. I have given anxious consideration to all the submissions made by the respective advocates and I am not at all inclined to allow the prayers made by the petitioners.

. Firstly, the prayer for transposing the petitioner as the plaintiff could have been entertained by the Court before the suit was allowed to be withdrawn. After the suit is allowed to be withdrawn and dismissed or disposed of that prayer cannot be entertained. Because for doing so, the order of dismissal of the suit

will have to be set aside. Joining the petitioners as plaintiffs now is a subsequent stage. Because, firstly the order of dismissal of the suit will have to be set aside. That cannot be done. Because that was an order passed by the Court on the application of the plaintiff and the plaintiff states that she does not want to proceed with the suit, then the Court has no option but to dismiss the suit or dispose it of. Secondly, it is not that the order of withdrawal of the suit was obtained by the plaintiff by suppressing the facts from the present petitioners. The application for that purpose was filed on 5.1.2005. That application was on record till the date of dismissal of the suit on 7.3.2005. The Petitioners before the Court allowed the suit to be withdrawn, did not take any objection and did not file any application for being transposed as the plaintiffs.

. Advocate for the petitioners contended that the petitioners were not aware of the application or purshis filed by the plaintiff because they were not present on 5.1.2005 when the application was filed by the plaintiff for withdrawal of the suit. Even if the Roznama

dated 7.3.2005 shows that the advocate for the petitioners was present when the suit was allowed to be withdrawn, he did not protest; he did not inform the court that his client i.e. the petitioners wanted to be transposed as the plaintiff. The order of withdrawal dated 7.3.2005 was passed in presence of the advocate for the petitioners. Therefore, he cannot plead ignorance of that order. It is only after 21 days, as rightly argued by the counsel for the contesting respondents, that the petitioners filed the above mentioned peculiar purshis. They wanted that the Court should record that the petitioners had prayed for being transposed as the plaintiff. If such a prayer was actually made by the petitioners on 7.3.2005, there was no reason for the Court to not to record it. But filing this purshis on 28.3.2005 by the petitioners is nothing but an attempt to bring something on record for which there was no basis nor foundation. The roznama of the Court or orders of the Court cannot be changed in this manner. If the petitioners had not made any submission about being transposed as the plaintiff on 7.3.2005, then they cannot be permitted to say that they had made such a

submission and the Court did not record it. If such arguments are accepted, that will create coax and everyone will try to alter the orders of the Court by taking out such purshis.

5. Thirdly, the suit filed by the plaintiff was in her personal and individual capacity. It is true, as pointed out by the counsel for the petitioners by reading certain paras of the plaint, that in the plaint the plaintiff has stated about certain rights of the over members of the petitioners/society. But that does not convert the suit of the plaintiff as the suit in a representative capacity. It is still a suit filed by her in her individual and personal capacity and, therefore, she cannot be prohibited from withdrawing the suit and the Court rightly allowed her prayer for withdrawal of the suit.

6. If the suit is withdrawn and if the petitioners thought that the society was at a loss then it was open to the society to file a separate suit. As rightly argued by the advocate for the contesting respondents, cause of action for the petitioners cannot be same cause of action for respondent No.1 to file original suit.

The impugned order of the City Civil Court, by which the precipe dated 28.3.2005 and the prayer therein for transposing was rejected, is dated 29.3.2005. More than one months time has lapsed, but even though the petitioners had all the rights to file and institute a fresh suit. But they have not done so. It is not a case and nothing has come on record that by withdrawal of the suit, the plaintiff/respondent No.1 has wiped away of the orders passed in the suit. Those orders, interim or ad interim, are the part of the record. Nothing has been brought on record by way of consent between the respondent No.1 and others before withdrawal of the suit from which it can be said that the orders have been rendered null and void. It is true that after withdrawal of the suit, all the interim or ad interim orders will come to an end automatically. But the fact that not given set of facts, the Court had passed those orders is a matter of record. Even then the petitioners have not chosen to file a suit.

7. The most important aspect that goes against the petitioner is that they did not apply to the Court for being transposed as the plaintiffs on the date when the withdrawal was

allowed in their presence. If they woke up in respect of their rights after 21 days and not by way of application but by way of peculiar purshis which was nothing to contradict the roznama and contradict the Court, then the Court was perfectly justified in rejecting the prayer, because prayer for transposing cannot be entertained after the dismissal of the suit.

8. His alternate prayer of the counsel for the petitioners that interim orders should be continued for some time as to enable the petitioners to file a suit cannot also be entertained because more than one month period has lapsed from the date of dismissal of the suit. What has occurred and transpired between this one month's period is unknown.

9. When the matter was appeared before me earlier for admission on 20.4.2005 I had asked the petitioners why they are not filing the suit for enforcement of their rights. From that date till today 12 days period has lapsed, but no steps have been taken by the petitioners nor any suit is filed. Therefore that prayer cannot be granted. For all these reasons the following

order is passed :-

ORDER

Civil Revision Application is dismissed.

No order as to costs.

Prayer for stay or status quo is rejected.

[D.G.DESHPANDE]

03/05/2005 JUDGE.